of the European Union, as provided for by Article 67(1)(d) of Presidential Decree No 917 of 22.12.1986 ('the TUIR'), or must this be regarded as justified on grounds of public policy, public security or public health, pursuant to Article 46 of the EC Treaty?

Commission v Belgium. Infringement. Tax exemption reserved to interest payments by resident banks and excluding interest payments by banks established abroad. Court of Justice (comments by Robert Neyt) (H&I 2013/86)

The Belgian Income Tax Code provides for a lump sum exemption for interest from certain regulated savings accounts, but restricts the exemption to interest from qualifying accounts held with financial institutions established in Belgium. The CJ found such a regulation to be a restriction on the freedom to provide services of Article 56 TFEU. Furthermore, the CJ found that such a restriction could not be justified, either by a need to ensure the effectiveness of fiscal supervision, or by the need to counter tax evasion or avoidance. Therefore, the CJ found the Belgian regulations to be an unjustified restriction of Article 56 TFEU.

Court of Justice of the European Union, 6 June 2013, no. C-383/10

JUDGMENT OF THE COURT (Fifth Chamber)

6 June 2013[1]

(Failure of a Member State to fulfil obligations – Articles 56 TFEU and 63 TFEU – Articles 36 and 40 of the EEA Agreement – Tax legislation – Tax exemption reserved to interest payments by resident banks and excluding interest payments by banks established abroad)

In Case C-383/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 30 July 2010,

European Commission, represented by R. Lyal and F. Dintilhac, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by J.-C. Halleux and M. Jacobs, acting as Agents,

defendant,

THE COURT (Fifth Chamber),

composed of A. Borg Barthet, acting for the President of the Fifth Chamber, J.-J. Kasel and M. Berger (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1. By its application, the European Commission seeks a declaration from the Court that, by introducing and maintaining a system of discriminatory taxation of interest payments by non-resident banks, resulting from the application of a tax exemption reserved only to interest payments by Belgian banks, the Kingdom of Belgium has failed to fulfil its obligations under Articles 56 TFEU and 63 TFEU and Articles 36 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

1 Language of the case: French.

Belgian law

2. Article 21(5) of the Income Tax Code ('the ITC 92'), in the version applicable to the tax year 2010 (income from 2009), provides:

'Income from capital and movable property shall not include:

...

5°. the first tranche of EUR 1 730 (basic amount EUR 1 250) per year of income from savings deposits received, without any contractual stipulation as to maturity dates or periods of notice, by credit institutions established in Belgium governed by the Law of 22 March 1993 relating to the status and control of credit institutions, on the basis that:

– those deposits must, moreover, satisfy the criteria laid down by Royal enactment after approval by the Banking, Financial and Insurance Commission ... , regarding the currency in which they are denominated, the conditions and methods of withdrawals and deductions and regarding the structure, the level and the method for calculating their remuneration;

– for the purposes of application of this provision, periods constituting mere safeguard measures that the depositary reserves the right to invoke shall not be regarded as periods of notice.'

3. Article 313 of the ITC 92 lays down the principle of exonerating withholding tax:

'Taxpayers subject to personal income tax are not required to state in their annual tax return the income from capital and moveable assets ... in respect of which withholding tax has been paid'.

4. The Royal Decree of 27 August 1993 implementing the Income Tax Code 1992, as amended by the Royal Decree of 7 December 2008 (Moniteur belge of 22 December 2008, p. 67513), lays down the criteria which the savings deposits referred to in Article 21(5) of the ITC 92 must, moreover, satisfy in order to benefit from the application of that article.

The pre-litigation procedure

5. By letter of 19 October 2006, the Commission reminded the Belgian authorities of the obligations flowing from Articles 49 EC and 56 EC (now Articles 56 TFEU and 63 TFEU) and from Articles 36 and 40 of the EEA Agreement and of the need to comply with them.

6. By letter of 27 February 2007, the Belgian authorities stated in reply to that letter of formal notice that the reasoning put forward by the Commission is based, as regards Article 63 TFEU on an unfounded assumption and, as regards Article 56 TFEU, on a failure to have regard to the objective pursued by the contested measure, which, if it were extended to savings deposits held in foreign banks, would result in discrepancies of application according to the Member State or to the State party to the application of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38) in which the savings deposit is held, discrepancies which are moreover harmful for the taxpayers concerned.

7. In the reasoned opinion, sent on 26 June 2009 to the Belgian authorities, the Commission alleged that, by introducing and maintaining a system of discriminatory taxation of interest payments by non-resident banks, resulting from the application of a tax exemption reserved only to interest payments by Belgian banks, that Member State was failing to fulfil its obligations under Articles 49 EC and 56 EC and Articles 36 and 40 of the EEA Agreement. That opinion imposed a time-limit of two months in which to comply with the provisions of the Treaty on the Functioning of the European Union and the EEA Agreement.

8. By letter of 28 September 2009, the Belgian authorities replied to the reasoned opinion, stating inter alia that the contested measure was justified by the need to guarantee the effectiveness of fiscal supervision and the need to protect small savings.

9. As it was not satisfied with that reply, the Commission brought this action for failure to fulfil obligations on 26 July 2010.

The action

Arguments of the parties

10. As a preliminary point, the Commission states, in its application, that direct taxation is not an exclusive competence of the Member States, but that it is implicitly and necessarily included in the competence relating to the internal market referred to in Article 4(2)(a) TFEU and is considered to be a shared competence between the European Union and the Member States. In its view, that interpretation is supported by the case-law of the Court of Justice, according to which although

direct taxation falls within the competence of the Member States, the Member States must none the less exercise that competence in a manner consistent with European Union law. In support of its position, the Commission cites the judgment in Case C-157/05 Holböck [2007] ECR I-4051, paragraph 21).

11. As regards whether the national provisions in question fall within the scope of Article 56 TFEU or Article 63 TFEU, the Commission, referring to paragraph 43 of the judgment in Case C-452/04 Fidium Finanz [2006] ECR I-9521, submits that, given the effects of those provisions, the failure to fulfil obligations alleged must be examined in the light of both the freedom to provide services and the free movement of capital.

12. In the first place, with respect to the free movement of services, the Commission, recalling the objective and the personal scope of Article 56 TFEU et seq., claims that the Belgian legislation in question infringes those provisions since it has the effect of discouraging Belgian residents from using, for the management of savings accounts, the services of banks established in other Member States of the European Union and in States which are parties to the EEA Agreement. The Commission states that interest payments by such banks can never be exempt on the sole ground that the debtor bank is not established in Belgium, even though that bank is able to fulfil all the other conditions laid down in the Belgian legislation in question.

13. As regards the argument alleging that no formal complaint has been made in this regard by the financial sector and in particular by credit institutions established abroad, the Commission takes the view that it is irrelevant given that the action for a declaration of a failure to fulfil obligations is objective and so cannot be subject to there being any complaint. Moreover, the Commission, stating that the freedom to provide services gives rise not only to the entitlement to provide services but also the entitlement to receive them, claims that the measure in question discourages not only banks established abroad from offering their services to Belgian residents, but also Belgian residents from using the services of those banks and therefore constitutes a restriction on that fundamental freedom.

14. The Commission submits moreover that such a restriction cannot be justified by any of the arguments put forward by the Kingdom of Belgium and that, in any event, that restriction infringes the principle of proportionality.

15. As regards, first, the justification for that restriction by the overriding reason relating to the public interest in ensuring the effectiveness of fiscal supervision, the Commission concedes that supervision may, in certain situations, be very difficult and that, in principle, the need to prevent tax avoidance and abuses my justify restrictions on freedom of movement. In that regard, relying (i) on its Communication of 10 December 2007 to the Council, the European Parliament and the European Economic and Social Committee, entitled 'The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries' [COM (2007) 785 final] and (ii) on the judgment in Case C-324/00 Lankhorst-Hohorst [2002] ECR I-11779, paragraph 37, the Commission submits that, although, by refusing to exempt interest paid by foreign banks, the Belgian legislation prevents tax evasion, it none the less also impedes the legitimate exercise of the freedom to provide services. That measure therefore manifestly exceeds the scope of what is necessary to achieve its objective. The Commission moreover observes that the fact that the Kingdom of Belgium now participates in the information exchange system of Directive 2003/48 specifically enables the risk of tax evasion to be reduced considerably.

16. As regards, second, the justification based on the socio-economic nature of the measure in question in so far as it purportedly encourages provident savings by 'small taxpayers', the Commission is of the opinion that the tax exemption of interest payments by banks which are not established in Belgium does not run counter to that objective and that, on the contrary, as a result of such a measure, taxpayers may choose from a wider range of savings products, which even encourages them to save more.

17. The Commission submits, moreover, that the argument put forward by the Kingdom of Belgium, according to which it seems unlikely that the group of taxpayers targeted by the national measure in question would be interested in the possibility of placing its savings in foreign banks and that foreign credit institutions would seek to attract such customers, is mere speculation and is not therefore a valid argument for justifying such a restriction on a fundamental freedom.

18. Third, with respect to the justification based on the disparity of the levels of consumer protection where a bank fails, illustrated by the example of the difficult situation of Belgian savers

who are customers of the Luxembourg subsidiary of an Icelandic bank, the Commission contends that, on the one hand, the guarantees and protection afforded to savers in the event of the failure of a bank have been the subject of harmonisation in the European Union, in particular by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5), that directive having been the subject of a raising of the guarantee levels by Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 (OJ 2009 L 68, p. 3). On the other hand, the Belgian authorities have not clarified the nature and content of the levels of protection which are allegedly the subject of the disparities alleged. In any event, according to the Commission, national legislation must not influence consumers by treating the financial instruments of banks established outside Belgium unfavourably.

19. Fourth, as regards the argument that Belgian savers would be inadequately informed on account of the fact that a bank established outside Belgium would not necessarily use one of the languages spoken in Belgium, the Commission contends that it is for consumers alone to judge in which language they are equipped to receive information regarding the opening of a savings account. The Commission states in this respect that the Kingdom of Belgium has three official languages, which are also used in neighbouring Member States.

20. In the second place, with regard to the free movement of capital, the Commission, recalling that operations in current accounts or deposit accounts effected by residents with foreign financial institutions are set out in point VI.B of the nomenclature annexed to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article [63 TFEU] (OJ 1988 L 178, p. 5), and therefore fall within the notion of movement of capital, contends that the national legislation in question has the effect of making the cross-border transfer of capital less attractive by discouraging Belgian residents from opening savings deposits with banks which are not established in Belgium or from keeping their savings in those banking institutions. Accordingly, that measure constitutes a restriction on the free movement of capital within the meaning of Article 63 TFEU.

21. Furthermore, the Commission takes the view that none of the grounds of justification put forward by the Kingdom of Belgium is valid.

22. First, according to the Commission, that restriction cannot be justified by the grounds referred to in Article 65 TFEU, given that the situations of Belgian residents who receive and declare interest from their savings deposits with banks established in Belgium or banks which are not established in that Member State are objectively comparable. Accordingly, a difference in treatment would amount to arbitrary discrimination within the meaning of that article.

23. Next, as regards the argument put forward by the Kingdom of Belgium concerning the risk that certain banks which are not established in Belgium having customers residing in that Member State would not be inclined to offer a financial product fulfilling the conditions laid down by the national legislation, which would result in discrimination between Belgian residents with deposits outside Belgium according to whether or not their bank chooses to comply with the Belgian legislation, the Commission takes the view that such possible discrimination would be the effect not of the legislation in question but of the choice made by economic operators. Thus, the decision whether or not to choose a bank which makes available to them a financial product offering the Belgian system of exemption is a matter for Belgian residents.

24. With respect to a possible shortcoming of a bank established outside Belgium, which fails to comply with the conditions stipulated by the relevant Belgian legislation in order to be eligible for the exemption, the Commission claims that the Belgian authorities would be able to draw the appropriate conclusions from this and in particular withdraw the benefit of that exemption for such a bank.

25. Lastly, as regards the argument put forward by the Kingdom of Belgium that the legislation in question falls within the exception of Article 64(1) TFEU, since the Belgian scheme for exempting savings deposits already existed on 31 December 1993, that it has been maintained continuously in the Belgian legal order and that it has not undergone any substantial amendment since then, the Commission claims that it has not called in question the contested legislation in relation to banks established in a non-member country, except those banks which are established in one of the countries of the European Economic Area which are members of the European Free Trade Association (EFTA), but which fall within Article 40 of the EEA Agreement.

26. The Kingdom of Belgium relies on the guidance given in the judgment in Case C-101/05 A [2007] ECR I-11531, paragraphs 48 and 49, and states that the applicability of Article 64(1) TFEU

makes it possible to maintain with regard to non-member countries the restrictions on movements of capital that existed on 31 December 1993. The Belgian scheme for exempting savings deposits, which already existed on that date, has since then been maintained continuously in the Belgian legal order and has not undergone any substantial amendment since that date.

27. As regards free movement of capital, the Kingdom of Belgium, relying on Article 65(1)(a) TFEU, contests that, from the point of view of the exemption in question, Belgian taxpayers who invest in a savings deposit are in the same situation with respect to the place where their capital is invested according to whether or not their deposit is in Belgium.

28. In that regard, the Kingdom of Belgium states that, with respect to persons having a savings deposit in Belgium, the exemption from national tax is effected at source and therefore at the level of Belgian financial institutions. Thus, so far as concerns the 2010 tax year, the first tranche of income from a savings deposit, corresponding to an amount of EUR 1 730, was not subject to withholding tax. That first tranche was not regarded as income from capital or moveable assets and did not therefore have to be included in the annual tax return. On the other hand, the portion of income from a savings deposit exceeding that amount was subject to that withholding tax, but did not have to be mentioned in the annual tax return either. It is to that extent that it is an 'exonerating' system of withholding tax. Consequently, according to the Kingdom of Belgium, the national tax authorities are not as a rule aware of the existence of savings deposits in Belgium in relation to natural persons resident in the national territory.

29. On the other hand, as regards taxpayers having a savings deposit in another Member State, the Kingdom of Belgium states that income from such deposits must be declared by the taxpayer and is also now subject to exchange of information in the framework of Directive 2003/48. Where those taxpayers simultaneously have a savings deposit in Belgium and have claimed the benefit of the exemption in question in an amount of EUR 1 730 in respect of income from foreign savings deposits in the context of their annual return, the Belgian tax authorities are, according to that Member State, unable to verify whether those taxpayers have improperly benefitted from double tax exemption, namely, firstly, in respect of the income from the savings deposit in Belgium, by the system of exonerating withholding tax and thus anonymously and, secondly, in respect of income from the savings deposit in another Member State, at the time of the tax assessment of natural persons.

30. The Kingdom of Belgium further claims that, if it were to decide to remedy the alleged obstacle by eliminating the exemption in question in respect of income from savings deposits in Belgium, such deposits would be treated less favourably than income from savings deposits abroad. In that case, in respect of income from savings deposits in Belgium, tax would be levied at source by Belgian financial institutions at the time of receipt, in the form of an exonerating withholding tax, whereas, in respect of income from savings deposits abroad, Belgian tax would be levied, by means of the return lodged in the year following receipt of the income, in the form of an assessment carried out, on average, two years after receipt. Accordingly, Belgian taxpayers receiving income from a foreign savings deposit would benefit from a cash-flow advantage in relation to Belgian taxpayers having a savings deposit in Belgium. The Belgian Government therefore takes the view that the system established to avoid double exemption of income from savings deposits does not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and that there is no more proportionate system than the one in operation in order to achieve the objective of avoiding wrongful double exemption.

31. As regards freedom to provide services, the Kingdom of Belgium contends first of all that verification of compliance with the conditions laid down by the legislation in question, whatever the restrictions imposed by the Belgian tax authorities on foreign credit institutions, requires on request and effective exchange of banking information. Whilst it is true that, according to the Kingdom of Belgium, that exchange of information has improved considerably in recent years, that Member State takes the view none the less that Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), and in particular Article 8 thereof, is the appropriate instrument for this purpose. However, the problem lies not only in a possible lack of information on the part of other Member States, but also in the fact that it is not possible to cross-check information relating to Belgian and foreign savings deposits and therefore avoid wrongful double exemption.

32. Next, the Kingdom of Belgium, referring inter alia to the judgment in Joined Cases C-155/08 and C-157/08 X and Passenheim-van Schoot [2009] ECR I-5093, submits that the contested measure is justified by the need to guarantee the effectiveness of fiscal supervision.

33. In that regard, the Kingdom of Belgium claims that, since only Belgian financial institutions are liable to account for the withholding tax, the taxpayer cannot be held responsible for tax evasion in this respect. In the event that one of the conditions for exemption on the part of a Belgian financial institution has not been complied with, that institution is obliged to pay to the Belgian Treasury the withholding tax which was not levied at source. Given that the identity of the person receiving the interest does not have to be mentioned on the withholding tax return by the Belgian financial institution, the Belgian tax authorities cannot compel that institution to provide them with the identity of that person. Moreover, the Belgian financial institution concerned is not able to make a claim against its customer in order to recover the withholding tax, since the levying of that tax results from legal obligations which are incumbent solely on Belgian financial institutions. On the other hand, in the event that the exemption were extended to income from foreign savings accounts, the taxpayer himself would be taxed and could not make a claim against the foreign financial institution which failed to comply with one of the conditions for exemption. Since foreign financial institutions have no tax obligations vis-à-vis the Belgian tax authorities, it is unlikely that such institutions would offer their customers any form of guarantee of exemption from Belgian tax, so that it has to be recognised that the taxpayer would thus be deprived of any civil action against the foreign financial institution.

34. Accordingly, according to the Belgian Government, tax legislation which is justified by the need to guarantee the effectiveness of fiscal supervision can be considered to constitute a proportionate interference with the free movement of capital, even if that legislation is not aimed at purely artificial arrangements.

35. Lastly, the Kingdom of Belgium takes the view that, in any event, the Belgian tax legislation in question does not go beyond what is necessary to achieve its objective, namely ensuring that that exemption is not granted wrongfully.

36. As regards free movement of capital, the Commission states in its reply that it has not called in question the Belgian legislation in relation to financial institutions established in countries which are not parties to the EEA Agreement, so that the comments of the Kingdom of Belgium concerning the clause provided for in Article 64(1) TFEU are irrelevant, or the Belgian system of exonerating withholding tax which applies to income from capital exceeding the exempt amount.

37. Moreover, the Commission claims that the Kingdom of Belgium's line of argument concerning the risk of double exemption is not relevant given that that risks exists, with even more serious consequences, also in the purely domestic context where it is sufficient, in view of the anonymity enjoyed by savers, to divide savings between two or more banks in order to take advantage of double or multiple exemption from tax on interest. The Kingdom of Belgium cannot therefore justify discrimination at a cross-border level when it refrains from combatting the same risk of tax evasion at the national level.

38. As regards freedom to provide services and the justification based on the need to guarantee the effectiveness of financial supervision, the Commission contests the relevance of the reference to the judgment in X and Passenheim-van Schoot in the context of this case. Moreover, that institution takes the view that Directive 77/799 is a sufficient instrument in order to verify that foreign banks have complied with the conditions laid down by the Belgian legislation for the purposes of granting the exemption in question. Accordingly, the Commission maintains in full the form of order sought in its application.

Findings of the Court

Freedom to provide services

39. In connection with this complaint, the Commission submits, in the first place, that the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU.

40. As a preliminary point, it should be noted that, according to settled case-law of the Court of Justice, although direct taxation falls within their competence, the Member States must none the less exercise that competence in a manner consistent with European Union law (see Case C-48/11 A [2012] ECR I-0000, paragraph 16 and the case-law cited).

41. It should also be borne in mind that the provision of banking services constitutes a service within the meaning of Article 57 TFEU and that Article 56 TFEU precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them (see, to that effect, Case C-150/04 Commission v Denmark [2007] ECR I-1163, paragraph 37 and the case-law cited).

42. With reference to the single market and in order to permit the achievement of its objectives, Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Commission v Denmark, paragraph 38).

43. In addition, according to the Court's case-law, Article 56 TFEU precludes, inter alia, any national legislation which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see Case C-522/04 Commission v Belgium [2007] ECR I-5701, paragraph 38).

44. In this instance, it must be observed that the legislation in question in this case has set up a different tax system for interest from a savings deposit according to whether or not the interest is paid by banks established in Belgium. Such difference in treatment is explained, according to the Belgian Government, in particular by the fact that it is not possible to apply the same system in both cases in order to avoid double exemption where the taxpayer has a savings deposit in both Belgium and another Member State.

45. It is therefore necessary to verify whether such legislation creates obstacles to the freedom to provide services and whether, if it does, such obstacles are capable of being justified by the reasons put forward by the Belgian Government.

46. In that regard, it must be stated that, in its defence, the Belgian Government does not deny the existence of an obstacle to that freedom.

47. Next, it must be observed that the contested Belgian legislation, first, has the effect of discouraging Belgian residents from using the services of banks established in other Member States and from opening and keeping savings accounts with banks which are not established in Belgium, since interest payments by those banks are not eligible for the tax exemption in question where those banks are not established in Belgium. Moreover, that legislation is such as to discourage holders of a savings account with a bank established in Belgium, who therefore benefit from that exemption, from transferring their account to a bank established in another Member State.

48. Accordingly, it must be held that the legislation in question constitutes an obstacle to the freedom to provide services, prohibited, in principle, by Article 56(1) TFEU.

49. According to well-established case-law, national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed provided that they pursue an objective in the public interest, that they are appropriate for attaining that objective and that they do not go beyond what is necessary to attain the objective pursued (see, inter alia, Case C-269/09 Commission v Spain [2012] ECR I-0000, paragraph 62 and the case-law cited).

50. It is therefore necessary to examine whether the obstacle found to exist may be justified solely by the objective in the public interest relied on expressly by the Kingdom of Belgium, namely the need to guarantee the effectiveness of fiscal supervision.

51. As regards that justification, it must first be stated that the Court has already held that the need to guarantee the effectiveness of fiscal supervision could justify a restriction on the fundamental freedoms (see, to that effect, inter alia, X and Passenheim-van Schoot, paragraph 45).

52. As regards the claim that it is not possible to have recourse to European Union instruments concerning mutual assistance which is guaranteed in particular by Directive 77/799, it must be stated that the existing machinery for mutual assistance between the authorities of the Member States is sufficient to enable a Member State to check the truthfulness of the returns made by taxpayers relating to their income earned in another Member State (see, to that effect, Case C-371/10 National Grid Indus [2011] ECR I-0000, paragraph 78, and Commission v Spain, paragraph 68).

53. It is however possible that the instrument for cooperation referred to above may not always function in an efficient and satisfactory manner in practice. However, the Member States should not be able to rely on the possible difficulties in obtaining the information required or on the shortcomings of cooperation between their tax authorities in order to justify a restriction of the funda-

mental freedoms secured by the Treaty (see, to that effect, Case C-334/02 Commission v France [2004] ECR I-2229, paragraph 33, and Commission v Spain, paragraph 72).

54. There is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (see, inter alia, Case C-451/05 ELISA [2007] ECR I-8251, paragraph 95 and the case-law cited).

55. In that respect, the Belgian Government submits that the Court of Justice accepted, in X and Passenheim-van Schoot, the justification based on the insufficient effectiveness of that instrument of cooperation.

56. In that regard, it should be pointed out that in that judgment, the Court held that the application of an extended recovery period where there is a suspicion that taxable assets held in another Member State are being concealed is justified by the objective of ensuring the effectiveness of fiscal supervision and preventing tax evasion.

57. Since the present case concerns income declared by taxpayers, the Belgian tax authorities should not encounter any difficulties in obtaining the necessary information with respect to that income from another Member State.

58. Moreover, as the Kingdom of Belgium observes in its defence, income from foreign savings accounts which must be declared by the taxpayer is also subject to an exchange of information in the framework of Directive 2003/48.

59. Accordingly, the Belgian tax authorities have at their disposal a legal instrument, the effectiveness of which has not been called in question, in order to obtain information concerning the existence of foreign income from moveable assets and are therefore able to tax that income.

60. It follows from the foregoing that the justification based on the inadequacy of the cooperation instruments at the European Union level cannot be accepted.

61. As regards the risk of double exemption, and therefore, implicitly, the justification for the legislation in question by the objectives of preventing tax evasion and avoidance, it should be recalled that they are legitimate objectives recognised by the Court of Justice (see to that effect, inter alia, Case C-20/09 Commission v Portugal [2011] ECR I-2637, paragraph 60 and the case-law cited).

62. In that regard, it must be stated, as the Commission correctly observed, that that risk also exists in the situation where a taxpayer has two or more savings accounts with a bank established in Belgium and therefore in a purely domestic context. Since taxpayers enjoy anonymity in relation to interest from a Belgian savings account, it would be sufficient, in order to be able to take advantage of the exemption at issue several times, that the taxpayer entrust his savings to several different banks. It follows from this that the risk of evasion or abuse, relied upon by the Belgian Government, is inherent in the national system of exemption and does not depend on the existence of a cross-border element.

63. Moreover, even on the assumption that the national legislation in question is appropriate for ensuring the attainment of the objective of ensuring the effectiveness of fiscal supervision and, in particular, the prevention of tax avoidance and evasion, it must be held that that legislation goes beyond what is necessary to attain the objective pursued.

64. In accordance with well-established case-law, the prevention of tax evasion and avoidance can be accepted as justification only if the legislation is aimed at wholly artificial arrangements the objective of which is to circumvent the tax laws, which precludes any general presumption of tax evasion. Consequently, a general presumption of tax avoidance or tax evasion cannot justify a fiscal measure which compromises the objectives of the Treaty (see, to that effect, Case C-72/09 Établissements Rimbaud [2010] ECR I-10659, paragraph 34 and the case-law cited). In the present case, the contested national legislation not only prevents tax avoidance and evasion, but also the legitimate exercise of the freedom to provide services where taxpayers prove that their objective is not one of tax evasion.

65. It follows that the Belgian Government could have adopted less restrictive measures in order to attain the objective of preventing tax evasion.

66. In those circumstances, the justification for the legislation in question by the need to prevent tax avoidance and evasion in the context of guaranteeing the effectiveness of fiscal supervision cannot be accepted.

67. Lastly, with regard to the justification based on the fact that, in the case of savings accounts with banks established outside Belgium, where a taxpayer has wrongly benefitted from an exemption, it is incumbent on that taxpayer to pay the withholding tax without any possibility of bringing a civil action against the foreign bank, it is sufficient to note that the Belgian Government has failed to demonstrate why its concerns relating to a fair division of civil liabilities between the taxpayers and banks concerned could justify the application of a measure such as that at issue, with the aim of pursuing the objective of ensuring the effectiveness of fiscal supervision.

68. In those circumstances, that justification for the contested legislation cannot be accepted.

69. It follows from this that the restriction on the freedom to provide services brought about by the application of the contested national legislation, which reserves the grant of a tax exemption solely to interest payments by banks established in Belgium, to the exclusion of interest payments by banking institutions established in other Member States, cannot be justified by the objectives relied upon by the Kingdom of Belgium, and nor does that restriction satisfy the requirement of proportionality.

70. The Commission claims, in the second place, that, on account of the existence of the contested Belgian legislation, the Kingdom of Belgium has also failed to fulfil its obligations under Article 36 of the EEA Agreement, relating to the freedom to provide services.

71. In that regard, it must be observed that that provision of the EEA Agreement is similar to the provision laid down in Article 56 TFEU, so that the considerations relating to that article set out in paragraphs 40 to 69 of this judgment apply, in principle, also to the corresponding article of the EEA Agreement.

72. It must be stated that the Belgian Government puts forward justification only with respect to Article 56 TFEU. It follows that, in so far as no specific justification has been put forward by that government in relation to Article 36 of the EEA Agreement, it must be held that Article 36 of the EEA Agreement also precludes the contested national legislation.

Free movement of capital

73. In addition, the Commission seeks a declaration from the Court that the Kingdom of Belgium has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the EEA Agreement.

74. Since the provisions of the Treaty and the EEA Agreement on freedom to provide services preclude the contested legislation, there is no need for a separate examination of that legislation in the light of Article 63 TFEU and Article 40 of the EEA Agreement concerning the free movement of capital (see, by analogy, Commission v Belgium, paragraph 79).

75. Consequently, it must be held that, by introducing and maintaining a system of discriminatory taxation of interest payments by non-resident banks, resulting from the application of a tax exemption reserved only to interest payments by resident banks, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU and Article 36 of the EEA Agreement.

Costs

76. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the Kingdom of Belgium must be ordered to pay the costs.

On those grounds, the Court (Fifth Chamber) hereby declares that:

1. By introducing and maintaining a system of discriminatory taxation of interest payments by non-resident banks, resulting from the application of a tax exemption reserved only to interest payments by resident banks, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU and Article 36 of the Agreement on the European Economic Area of 2 May 1992;
2. The Kingdom of Belgium is ordered to pay the costs.

[Signatures]

Comments

The Belgian tax system provides for a lump sum personal income tax exemption of interest on private savings on so-called 'regulated Belgian savings accounts'. The exemption is limited to interest from savings accounts held with Belgian financial institutions (art. 21, 5° of the Belgian income tax code or BITC) which meet a myriad of rather stringent conditions (article 2 Royal Decree implementing the BITC).

The Commission has been having a problem with this aspect of Belgian tax law since 2006. Although the Belgian Government initially denied that there was a problem under EU law, later – after reading the Commission's reasoned opinion – it reluctantly admitted that an obstacle did indeed exist, but that it could be justified. In essence, the Belgian Government relied on two grounds for justification, both of which proved to be unsuccessful in meeting the test of the Court's scrutiny.

First, the Belgian Government reasoned that the restriction to Belgian financial institutions was required for the effectiveness of fiscal supervision as it would be difficult for the Belgian tax authorities to verify whether or not the foreign savings account would meet all the conditions for a regulated savings account. The CJ, however, responded with reference to the Mutual Assistance Directive (2011/16/EU) and its clear position that Member States should not be able to rely on the possible difficulties in obtaining information, nor on shortcomings in the cooperation between tax authorities, to justify a restriction on the fundamental freedoms enshrined in the TFEU. Rather strikingly, the CJ then continues with a reference to the Savings Directive (2003/48/EC), the effectiveness of which, continues the CJ, has never been called into question. This argument, however, seems to be rather beside the point, as the fact that information regarding the income from a foreign savings account is effectively exchanged with Belgium, does not imply that the Belgian tax authorities are effectively informed about the particularities regarding the underlying foreign account.

As to the second grounds for justification, the CJ is exceedingly straightforward and to the point. The Belgian Government had argued that broadening the exemption to savings accounts held with non-Belgian financial institutions would entail a risk of double exemption. Note, however, that from a technical point of view, interest income is in principle taxed in Belgium via an exonerating withholding tax, i.e. there is no need for a Belgian tax resident to include the interest income in its personal income tax declaration. This should be taken into consideration together with the fact that Belgian financial institutions will apply the exemption on savings accounts immediately at source on all qualifying savings accounts in their portfolio. Furthermore, Belgian financial institutions have no filing or reporting obligation with respect to the application of the exemption and lacking a register of bank accounts, the Belgian tax administration in practice has no tools to audit the application thereof. Therefore, as the CJ rightfully pointed out, a risk of multiple exemption is inherent to the Belgian system. Not only can Belgian savers spread their savings over various financial institutions, they effectively do this and should, since the deposit guarantee scheme only covers the first EUR 100,000 per institution. However, as stated above, all banks will apply the exemption at source on all their regulated savings accounts, whereas in the end, a taxpayer may only benefit from the exemption once and should effectively declare all interest income on which the exemption has unjustly been applied. In practice, not many do this and it is common knowledge that a practice has evolved wherein Belgians spread their savings over various banks, allocating sums which somewhat coincidentally match the amount required to profit from that year's exempted bracket to the greatest extent possible. As it is therefore clear that the risk of evasion or abuse is clearly inherent to the Belgian system, it follows that it is not at all dependant on the existence of a cross-border element. The CJ finally rejected the Belgian argumentation by stating that in any event, a general presumption of tax avoidance or evasion cannot justify a measure which compromises the objectives of the TFEU (with reference to the Courts prior ruling in C-72/09 (20 October 2010, *Établissements Rimbaud*).

As a result, the CJ ended up siding with the Commission, which did not and should not come as a big surprise. A negative decision in this case has been widely expected throughout the Belgian tax world.

The more interesting question is what the Belgian legislature will do with the tax treatment of savings accounts. Estimates from the Belgian National Bank point to total savings on regulated savings accounts of around EUR 240 billion. The Belgian regulated savings account has never been more popular. Undoubtedly, this is largely due to the financial crisis, but surely not in small part also to its beneficial tax treatment. First, there is the exemption as discussed above. Moreover, interest on regulated Belgian savings accounts is still subject to a 15% exonerating withholding tax (for the interest in excess of the exemption), whereas other interest income – including interest on foreign savings accounts – is subject to a 25% exonerating withholding tax, which also raises the question of compatibility with EU law (Request for a preliminary ruling submitted by the Belgian Constitutional Court: Decision 18/2013 of 21 February 2013]). Be that as it may, and despite the fact that the fraudulent multiple use of the exemption on income from savings accounts is widely known, it seems to have become the elephant in the room in any discussion on the tax treatment of savings accounts. With EUR 240 billion on the books of the Belgian banks, not all as stable as one would like to see them, and a government generally perceived to be more in favour of increasing taxes than cutting down its expenditure, nobody in the Belgian political landscape seems to be very eager to touch the subject.

In the follow-up literature regarding the case discussed here, the choice to be made by the Belgian legislature is traditionally presented as a variation on "*adapt or become extinct*", i.e. either strike the exemption altogether or open it up to interest derived from savings held with non-resident banks. Abolishing the exemption seems rather unfeasible in the current political landscape and is a quite unlikely outcome. The Belgian Minister of Finance, Mr Geens, although not wanting to be pinned down yet as to the final outcome, has repeatedly hinted at the expansion scenario (amongst others, in a response to a question in a plenary session of Parliament: Parliamentary Question no. 1844 of Mr Philippe Goffin of 6 June 2013).

However, the more relevant question is whether – if the measure is to be extended – the taxpayer will also end up benefitting from it. As set out above, the exemption is provided with respect to regulated savings accounts, which requires the savings accounts to meet a number of conditions in order for the interest to benefit from a tax exemption (amongst others, with respect to the yield, its calculation and payment, publicity with respect to the yield and regulation with respect to withdrawals, to name but a few). It seems highly unlikely that savings accounts with non-resident banks will qualify under the Belgian rules and even more unlikely that non-resident banks will ever cater their product in order for it to do so. In the end, this begs the question whether ultimately we will not end up arguing about the relevance of, and justification for, the rather restrictive Belgian conditions regarding the exemption. Perhaps the legislature should therefore consider other options, shortcutting these discussions from the start. Why not draft a general lump-sum exemption for a broader basket of savings income, including – as the legislature would seem fit –, interest from savings accounts, time deposit accounts, (non-) government bonds, etc. and this irrespective of the income's source. From a tax technical point of view, this exemption could then no longer be applied at source and therefore, will have to be claimed in the personal income tax return. This would have the additional tweak that the exemption would effectively be claimed only once. An even simpler solution would be to abolish the exemption in exchange for a widening of the lower tax brackets.

Robert Neyt

Olsen. Request for an Advisory Opinion from the EFTA Court on CFC legislation and trusts. EFTA Court (H&I 2013/97)

Request for an Advisory Opinion from the EFTA Court in the case of Fred Olsen.

1. *Do trusts as a form of establishment fall within the scope of the freedom of establishment provided for in Article 31 EEA? Supplementary question: If so, who holds rights pursuant to the provisions of the EEA Agreement?*

2. *If the first main question is answered in the affirmative: Does a trust meet the requirement of economic activity provided for in Article 31 EEA?*

3. *If the first main question is answered in the negative: Does a trust fall within the scope of the right to free movement of capital provided for in Article 40 EEA?*

4. *If the first or third main question is answered in the affirmative: Do the Norwegian CFC rules involve one or more restrictions on the freedom of establishment or the right to free movement of capital?*